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82-2053

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

ELMER H. SINGLETON,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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June 14, 1983

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I. QUESTIONS PRESENTED

1. Where credibility is a factor in weighing the evidence on contributory negligence, and the jury has determined that a plaintiff was free of such negligence and is entitled to damages of one million dollars ($1,000,000.00), has the Seventh Amendment right to a jury trial been violated where the district court grants the defendant's motion for a judgment notwithstanding the verdict?

2. Where a Circuit Court of Appeals fails to follow its own precedent set by another panel, should the Supreme Court exercise its supervisory power to control the uniform administration of justice?

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v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Elmer H. Singleton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, decided February 7, 1983.

OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia appears in the Appendix hereto. The unpublished opinion of the Court of Appeals for the Fourth Circuit also appears in the Appendix, as well as the order denying the petition for rehearing and suggestion for rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 7, 1983, and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 16, 1983. The petition for certiorari was filed within ninety days of the date of final judgment. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution reads as follows:

> In Suits at Common Law, where a value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

STATEMENT OF THE CASE

Elmer H. Singleton, petitioner, filed this diversity of citizenship case on January 26, 1981 in the United States District Court for the Eastern District of Virginia against Virginia Electric and Power Company (Vepco) and Arthur J. Lancaster, Jr., doing business as Bennett's Creek Wholesale Nursery (Lancaster). The petitioner alleged that Vepco and Lancaster were negligent in maintaining and permitting high voltage utility wires to exist over a dumping area at the nursery, and that as a result of this joint negligence the petitioner sustained severe and permanent electrical injuries which required the amputation of his right arm, several toes on both feet, and rendered him totally disabled.

The case was tried before a jury on September 23, 24, 25, 28, 29, and 30, 1981 in Norfolk, Virginia, before District Judge Walter E. Hoffman. At the conclusion of the Plaintiff's evidence, both Defendants moved for directed verdicts. The trial court granted Lancaster's motion on the ground that the Plaintiff had failed to make out a jury issue as to Lancaster's negligence. The trial court denied the motion of Vepco. During the course of the trial, Judge Hoffman ruled that there was a jury issue as to the negligence of Vepco and as to Singleton's contributory negligence.

After being properly instructed by the court, the jury returned a verdict for the petitioner in the amount of one million dollars ($1,000,000.00). Vepco then requested that the jury's decision be overturned, and moved the court for a judgment notwithstanding the verdict on the grounds that Singleton was contributorily negligent as a matter of law and that Vepco was free of any negligence. The district court reviewed briefs and oral argument on the issue of contributory negligence of the petitioner, and thereafter ruled that he was contributorily negligent and sustained Vepco's motion. Final judgment for Vepco was entered on February 23, 1982.

Singleton gave Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. Oral argument was heard on December 6, 1982 in Richmond, Virginia and on February 7, 1983 the Fourth Circuit handed down an unpublished two-paragraph opinion in which it stated in part, "...we too are persuaded that plaintiff was guilty of contributory negligence as a matter of law..." A timely petition for rehearing and a suggestion for rehearing *en banc* was filed on February 18, 1983. The basis of the petition for rehearing was that a recent Virginia case, *Wells v. McMann,* 223 Va. 192, 288 S.E.2d 43 (1982), was unknown to the court when it made its decision and also that the Virginia

Supreme Court was about to decide a case concerning contributory negligence in electrocution cases *Vepco v. Winesett,* No. 801872 (1983). It was requested that the court rehear the *Singleton* case in light of these recent developments in Virginia law.

The suggestion for a rehearing *en banc* was made on the basis that prior to the decision being handed down in *Singleton,* another panel of the Fourth Circuit had reviewed a similar electrocution case, *Keller v. Virginia Electric and Power Company,* No. 81-2199, decided May 10, 1982, in which the jury had determined that the plaintiff was guilty of contributory negligence. The Fourth Circuit had affirmed the jury's decision and held that "...the case was fairly tried and fairly submitted to the jury." It was suggested to the court that a conflict between the panels existed and that it would be appropriate in order to maintain conformity of the court's decision to rehear the *Singleton* case *en banc.* It was also suggested that a rehearing *en banc* was appropriate because the case raised significant issues concerning the conflict between the respective functions of judge and jury, particularly where credibility was at issue. On March 16, 1983 the Fourth Circuit denied the petition for rehearing.

On February 3, 1979, the date that Mr. Singleton was electrocuted, he had been a truck driver for approximately two years with no prior accidents of any nature. He was 39 years old, was married and had five children, and was a resident of Kentucky. He was ordered to take a load of wood chips to Mr. Lancaster's nursery in Portsmouth, Virginia, and he had never delivered to this nursery before. Mr. Singleton denied that he had been warned of any power lines at the nursery where he was supposed to dump the wood chips, and denied that he ever saw the power lines prior to sustaining his injuries. This testimony was contradicted by a defense witness, who claimed he told Mr. Singleton about the utility wires.

Mr. Singleton arrived at the nursery area at approximately 2:00 p.m. The weather was partially cloudy with a cold wind blowing and a chill factor of 26 degrees. He entered a gravel road from off the highway and observed the dumping area approximately two-tenths of a mile down the road and to his right. He testified that he looked for overhead obstructions or other hazards as he drove toward the dumping site. Photographs of his view showed that the uninsulated utility wires blended into the background of trees behind the dumping pit. On two other occasions as he got closer to the dumping site he again looked for overhead obstructions but did not see any. Upon making the determination that it was safe to dump in this area, he backed his truck up to the dumping pit. He got out of the cab of the tractor, walked across a narrow catwalk over the tires and tripped the tailgate lever. While doing this his body was in a bent position at all times.

He then engaged the power take-off so the load would dump, and the trailer began lifting in the air so the wood chips would slide out. He raised the trailer bed slowly to avoid a sudden shifting of the load, and it took approximately one minute for the load to raise up. He watched the mirrors on both sides of the truck and could see the back end of the trailer and tops of the rear tires. During this unloading process, unknown to Singleton, the top of the trailer had come into contact with an overhead high voltage utility wire. This wire did not run across the dumping pit, but instead ran parallel to and just inside one of the sides of the pit. The wire was three-tenths of an inch in diameter and was made of aluminum. It had been installed approximately five years prior to the injury and because of its age had turned a slight dull-gray color.

It was necessary for Singleton to leave the cab in order to see whether the wood chips had completely unloaded. As he began to step to the ground he was holding onto a metal handle on the cab, and when he finally touched the ground he felt excruciating pain. He could not move, make a sound or see, although he could smell his flesh burning. In effect, he had grounded the energized cab. The arm holding onto the handle was eventually amputated, as well as several toes on both feet.

Evidence showed that trailers similar to the one Singleton had been driving on February 3, 1979 had been delivering products to the dumping pit for approximately twelve months before the injury. Lancaster, the owner of the nursery, testified that in his opinion the overhead wires were "open and obvious." However, he also stated that he was careful to meet any truck that was going to make a delivery at the nursery in order to warn the truck drivers of the presence of the overhead wires. Neither Lancaster nor any of his agents were at the nursery on the day Mr. Singleton arrived to deliver his load. Mr. Singleton was the first and only truck driver who had not been warned by Lancaster about the presence of these wires.

Other witnesses for the Defendants testified that the lines were "open and obvious." Mr. Singleton denied this fact, and photographs introduced into evidence also revealed that the lines could easily fade into the background of trees and clouds, depending on the angle of the view.

Mr. Singleton offered expert testimony to the jury which showed that Vepco maintained a recloser, which is a fault-protective device intended to break the current flowing through the lines if it exceeds a level of 200 amperes. If the current did exceed this amount the recloser should cut off current through the lines in approximately 11.5 seconds. The expert concluded that there had been enough current going through the lines after the trailer made contact with

the line to activate the recloser prior to Mr. Singleton's stepping to the ground.

Vepco's own maintenance records of the recloser in question showed that the recloser had not been properly inspected and maintained. It was the expert's opinion that the recloser did not operate properly because it had not been inspected, and that Singleton would not have been injured if the recloser had worked correctly. He also testified that because the wires were not insulated Vepco had failed to comply with industry standards and good engineering practice.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the Seventh Amendment right to trial by jury, and has sanctioned the district court's invasion of the jury's province.

This case squarely addresses the powerful conflict between judge and jury in our federal judicial system, and needs review by this Court in order to reinforce and protect each citizen's Seventh Amendment right to a trial by jury. Although the Court should naturally be reluctant to grant a writ for every case in which a Seventh Amendment violation is alleged, it is respectfully contended that the facts of this case shock the conscience to such a degree that a writ is appropriate. Furthermore, it is appropriate for two additional reasons; (1) the lower federal courts need to be reminded of the restraint on their power within the judiciary, and to be cautioned against unsurping the power of the jury; and (2) the public needs to be reassured that not only its constitutional right to trial by jury is being protected by the Supreme Court, but also that its power to decide issues of fact is not being eroded by the federal courts.

The Supreme Court has, in the past, granted writs to review Seventh Amendment violations. In considering a petition in a Federal Employer's Liability Act (FELA) case, the Supreme Court held, "It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case." *Wilkerson v McCartny,* 336 U.S. 53, 55 (1949). In *Wilkerson,* an action was brought for personal injuries sustained as a railroad employee. A directed verdict was entered for the defendant and the State Supreme Court affirmed. After granting *certiorari the United States Supreme Court* reversed, and held that in many previous cases it had ruled that where jury trials are required, courts must submit issues on negligence to a jury if evidence might justify either way on those issues. *Lavender v Kurn,* 327 U.S. 645 (1946); *Bailey v Central Vermont Ry.,* 319 U.S. 350 (1943); *Jones v East Tennessee V. & G. R. Co.,* 128 U.S. 443 (1888).

In *Beacon Theatres v Westover,* 359 U.S. 500 (1959), an antitrust case, the Court held that certiorari was granted to review the alleged Seventh Amendment violation because the "... Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the upmost care." 359 U.S. at 501.

In *Atlantic and Gulf Stevedores, Inc. v Ellerman Lines, Ltd.,* 369 U.S. 355, *rehearing denied* 369 U.S. 882 (1962) an employee sustained personal injuries and sued the owner of a vessel on which he was working. Jurisdiction was based on diversity of citizenship. The owner-defendant brought in the employer and alleged that their negligence was a defense to any action against it by the plaintiff-employee. In this case the employee's right leg had to be amputated. A jury awarded $100,000.00 to the employee, and held that

there was no negligence on behalf of his employer. The vessel owner than appealed to the Court of Appeals, which affirmed the judgment for the plaintiff but reversed the jury's decision against the employer. The Supreme Court granted certiorari, and stated as follows:

> We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the district court can predetermine them for the Seventh Amendment says that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." 369 U.S. at 358.

The Supreme Court held that by reason of diversity of citizenship the right to trial by jury was carried with the case and an alleged violation was a proper grounds for review. It cited *Byrd v blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) for the proposition that the Seventh Amendment fashions a federal policy favoring jury decisions of disputed fact questions. It went on to state that a search for one possible view of the case which makes the jury's finding inconsistent results in a collision with the Seventh Amendment. Accordingly, the decision of the federal appellate court was reversed.

Questions of negligence, whether primary or contributory, are ordinarily for the jury to decide. *See Harner v John McShain, Inc. of Maryland,* 394 F.2d 480 (4th Cir. 1968). The Fourth Circuit has also held that whether a question of negligence is one for the court or the jury is a question of federal practice and is governed by federal and not state decisions. *Burcham v J.P. Stevens Co.* 209 F.2d 35 (4th Cir. 1954). In a diversity of citizenship case there is no question

that federal standards control when considering the sufficiency of the evidence presented to a jury. *Wratchford v S.J. Groves & Sons Co.* 405 F.2d 1061 (4th Cir. 1969) The *Wratchford* case held that if, from the evidence, competing inferences arise, one or more of which might be the basis for a factual decision supporting liability, and one or more which might not, the case must be left to the jury under appropriate instructions.

In considering the motion for judgment n.o.v., the federal court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. *Barrett v Robinson,* 65 F.R.D. 652 (E.D.Pa. 1975); *Wright and Miller, Federal Practice and Procedure:* Civil §2524 (1971). The credibility of witnesses who testified at the trial is for the jury and not the court. *Jackson v Denno,* 378 U.S. 368 (1964). Furthermore, issues concerning negligence and contributory negligence are mixed questions of law and fact. The ultimate answer to such questions must come from the jury, under proper instructions from the judge. *Tucker v Spalding,* 80 U.S. 453 (1871).

The Supreme Court has held that where fair-minded men might reach different conclusions on the question of negligence, this question should be left to the jury. "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence." *Bailey v Central Vermont Ry.,* 319 U.S. 350, 353 (1943). Where the inference drawn from a jury had support in evidence that a railroad negligently caused a fatal accident a judgment notwithstanding the verdict would be improper as a deprivation to the plaintiff of his Seventh Amendment right to trial by jury. *Tennant v Peoria and P.U.Ry. Co.,* 321 U.S. 29 (1944).

In the case *sub judice* the district court has substituted its judgment of the facts for that of the jury, and has determined that Mr. Singleton should have seen the utility wires and that he failed to act reasonably when unloading his truck. In order to reach such a conclusion it had to weight the credibility of witnesses, particularly because there was a conflict in the testimony. When such a conflict exists, and the district court nevertheless imposes its will on the jury, the federal court has usurped the power of the jury and has violated the Seventh Amendment.

The jury in *Singleton* heard six days of testimony, heard the arguments of counsel concerning negligence and contributory negligence, and was properly instructed on the law. It collectively weighed the credibility of the witnesses who testified. It diligently and competently went about its duty as charged by the court, in determining the fact issues of negligence and causation. It thereafter rendered a verdict in the amount of one million dollars ($1,000,000.00) in compensatory damages for the injuries sustained by Mr. Singleton, and even the trial court stated that such damages were "clearly not excessive."

The jury in *Singleton* has, in effect, been told by the district court that it has performed its duty in a careless fashion, and that no fair-minded men could have reached the conclusion that this jury reached. We could not disagree more strongly with such a conclusion. No jury makes an award lightly, and certainly no jury would award one million dollars ($1,000,000.00) in damages unless it collectively believed that the evidence justified such an award. This jury, as well as the public, was no doubt shocked that the six days it spent in federal court and the time that it spent in its deliberations were apparently in vain.

In the case *sub judice* conflicting testimony and various inferences to be drawn from that testimony were obvious.

That such a case was taken from the jury rightfully shocks the consicence of the public at large and the jury that deliberated in this matter. It has violated the petitioner's Seventh Amendment constitutional right to a trial by jury. We respectfully request that the Supreme Court grant the petitioner's writ of certiorari, not only to review and hopefully correct an injustice, but more importantly to protect and reaffirm the constitutional right to a jury trial for all citizens of the United States.

2. The Fourth Circuit has failed to follow a controlling decision of another panel within its circuit, and requires the exercise of this Court's power of supervision.

When Mr. Singleton petitioned the Fourth Circuit to rehear the case and suggested a rehearing *en banc,* he pointed out to the Fourth Circuit that there appeared to be a conflict between the decision in his case and a prior controlling decision. It asked the Fourth Circuit to consider the *Singleton* case *en banc* in order to maintain uniformity of its decisions. Without comment, this suggestion was denied.

On May 10, 1982 the Fourth Circuit handed down an unpublished decision in *Keller v Virginia Electric and Power Co.,* No. 81-2199, which involved a dump truck driver who was electrocuted by elevating his dump bed into overhead uninsulated utility wires. The driver had attempted to dump out water which had accumulated in his trailer bed at a nondesignated dumping site. He had pulled his truck underneath high voltage utility wires and then hydraulically lifted up the trailer to dump out the water. The edge of the trailer came in contact with the wires and he sustained severe injuries. He had been on the premises on nine previous occasions and was familiar with the surroundings, and voluntarily selected the dumping area. He also acknowledged that he had seen the wires prior to dumping.

At the trial the presiding judge overruled Vepco's motion for a directed verdict based on contributory negligence, and allowed the case to proceed. The jury, after careful deliberation, found that the plaintiff was guilty of contributory negligence and denied recovery. The plaintiff appealed the jury verdict the Fourth Circuit affirmed, holding that "...the case was fairly tried and fairly submitted to the jury."

The *Keller* case was not mentioned in the *Singleton* opinion, which was handed down several months later (February 7, 1983) notwithstanding the conflict between these two decisions. On the one hand a case of contributory negligence was allowed to be submitted to the jury, and that decision was affirmed on appeal. The facts of that case strongly suggested that Mr. Keller was contributorily negligent, and even though his negligence was much greater than that attributable to Mr. Singleton, the Fourth Circuit nevertheless held that his case had been fairly submitted to the jury, notwithstanding the implications of contributory negligence.

On the other hand, when the jury was allowed to weigh the conflicting testimony of the witnesses in the *Singleton* case and to judge the credibility of Mr. Singleton and opposing experts, and thereafter allowed to draw reasonable inferences based upon that testimony, the Fourth Circuit held that the case should never have gone to the jury, based on contributory negligence as a matter of law. These two decisions are clearly in conflict.

One panel of a circuit court cannot disregard the precedent set by a prior panel, even though it may conceive error in the prior decision. Absent an overriding Supreme Court decision or a change in the statutory law, only the court *en banc* can disregard prior case law. *Davis v. Estelle,* 529 F.2d 437 (5th Cir. 1976); 9 *Moore's Federal Practice,*

§235.02, p. 35-5, n. 3 (1982). A more recent case, *LeVick v. Skaggs Co., Inc.*, 701 F.2d 777 (9th Cir. 1983) has reaffirmed that absent the convening of an *en banc* panel, or subsequent Supreme Court decisions overruling a prior decision, the holding of a prior panel would be controlling authority within the circuit.

The Fourth Circuit has attempted to ignore its responsibilities in this regard in two ways: (1) by not publishing its decisions in certain cases which potentially concern Seventh Amendment violations, thus avoiding widespread knowledge of such conflicts, and (2) by not fully discussing and therefore failing to respond to the issues raised in the appellants' briefs. The summary fashion in which the Fourth Circuit entered its opinion in the *Singleton* case and the *Keller* case also reinforces the petitioner's contention that the Fourth Circuit has refused to address errors of law, but instead has merely weighed the evidence as a jury. It is not the appellate court's function to weigh the credibility of witnesses and draw inferences which favor one side or another.

The Supreme Court has broad supervisory power over the lower courts. *United States v Munsingwear,* 340 U.S. 36 (1950). The petitioner respectfully prays the Supreme Court to exercise that supervisory power to remedy the conflict between the cases in the Fourth Circuit and to insure uniformity of the appellate process in reviewing potential Seventh Amendment cases.

VII. CONCLUSION

For the above-cited reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted this 14th day of June, 1983.

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and

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ELMER H. SINGLETON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 81-10
	)	
VIRGINIA ELECTRIC AND POWER COMPANY, et al,	)	
	)	
Defendants)		

ORDER

This day came the parties, by counsel, on VEPCO's motion for judgement notwithstanding the verdict or, in the alternative, for a new trial. It appearing to the court from the briefs of the parties, hereby made a part of the record, and from the argument of counsel that judgement notwithstanding the verdict should be granted for VEPCO and that, if reversed on appeal a new trial will be required, all for the reasons stated on the record in open court, Wherefore, it is hereby.

ORDERED that VEPCO's motion for judgement notwithstanding the verdict is granted and that VEPCO's motion for a new trial is conditionally granted in the event that the judgement for VEPCO is reversed.

Walter E. Hoffman
United States District Judge

Norfolk, Virginia
February 23, 1982

****

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Unpublished

No. 82-1231

Elmer H. Singleton,

Appellant,

v.

Virginia Electric and Power Company,
a Virginia Corporation,

Appellee,

and

Arthur J. Lancaster, Jr., d/b/a
Bennett's Creek Wholesale Nursery;
Mildred L. Lancaster, d/b/a,
Bennett's Creek Wholesale Nursery
and Colemen Nursery, Incorporated,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, Senior District Judge.

Argued December 6, 1982 Decided February 7, 1983

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Russell N. Brahm, III, Raymond H. Strople (Willard J. Moody, Moody, Strople, Brahm & Lawrence, Ltd.; Leonard T. Jernigan, Jr., Paul J. Michaels, Michaels & Jernigan on brief) for Appellant; G. H. Gromel, Jr. (Matthew J. Calvert, Hunton & Williams on brief) for Appellee.

PER CURIAM:

In this diversity action for personal injuries, the district court granted defendant judgment n.o.v. on the ground that plaintiff was contributorily negligent as a matter of law. Plaintiff, a truck driver, was severely injured when he undertook to empty a dump truck in a dumping area under high voltage electric wires owned and maintained by defendant. When the truck was raised, it made contact with wires and plaintiff's injuries resulted. It was plaintiff's theory that defendant was negligent in maintaining and permitting the electric wires to exist over a dumping area.

We affirm. From our examination of the record and consideration of the briefs and oral argument, we, too, are persuaded that plaintiff was guilty of contributory negligence as a matter of law, thus barring recovery by him under Virginia law. *See,* Watson v. Virginia Electric & Power Co., 199 Va. 570, 100 S.E.2d 774 (1957).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 82-1231

Elmer H. Singleton,

Appellant,

versus

Virginia Electric and Power Company,
a Virginia Corporation,

Appellee,

and

Arthur J. Lancaster, Jr., d/b/a
Bennett's Creek Wholesale Nursery;
Mildred L. Lancaster, d/b/a,
Bennett's Creek Wholesale Nursery
and Coleman Nursery, Incorporated,

Defendants.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Ervin, and Judge Haynsworth.

For the Court,

Filed
March 16, 1983
U.S. Court of Appeals
Fourth Circuit

/s/ William K. Slate, II
CLERK

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-2199

Allen E. Keller,

Appellant,

versus

Virginia Electric & Power Company and Davis Grain Corporation,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Argued April 2, 1982 Decided May 10, 1982
Before HAYNSWORTH, Senior Circuit Judge, WIDENER and CHAPMAN, District Judges.

Louis B. Fine, Lewis Allen (John R. Lomax, Fine, Fine, Legum & Fine on brief) for Appellant; R. Kenneth Wheeler (Douglas W. Davis, Michael D. Tryon, Hunton & Williams on brief) and William B. Eley (Willcox, Savage, Dickson, Hollis & Eley, P.C. on brief) for Appellee.

PER CURIAM:

The plaintiff sought damages from Virginia Electric & Power Company and Davis Grain Corporation for personal injuries he sustained, but the verdict of the jury went against him as to both defendants.

Keller drove a large, grain hauling tractor-trailer. The trailer was thirty feet long and was equipped with hydraulic lifts for dumping. Because there had been rain the night before, there was water on the floor of the trailer which Keller wished to dump before taking on a load of grain. he

chose a site on the premises of Davis Grain above which electric lines had been strung by Vepco 21.6 feet above the ground. There Keller opened the tailgate and activated the hydraulic lift until the rising forward edge of the trailer contacted the power lines, severely injuring Keller who was in contact with the truck.

The action was defended by each of the defendants on the ground that it was not negligent and upon the ground that the plaintiff was guilty of contributory negligence..

On appeal, the plaintiff complains of evidentiary rulings and of the court's instruction to the jury. After full consideration, however, we are satisfied that the case was fairly tried and fairly submitted to the jury. We find no reversible error.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 1983, three (3) copies of the petition for writ of certiorari were mailed, postage prepaid, to Mr. G.H. Gromel, Jr. and Mr. Matthew J. Calvert, of HUNTON & WILLIAMS, P.O. Box 1535, Richmond, Virginia 23212, counsel for the respondent. I further certify that all parties required to be served have been served.

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